(1) Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SECOND LIEUTENANT RYAN W. DAVIS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether petitioner's conviction for violating Article 125, UCMJ, for engaging in consensual sodomy must be set aside in light of this Court's holding in *Lawrence v. Texas*, 539 U.S. 558 (2003).

II. Whether an airman's admission during a plea inquiry that his conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces was "voluntary" and "intelligent" when, at the time he made it, he had just been misinformed that his conduct violated federal law.

III. Whether Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, is overly broad and void for vagueness as applied?

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The petitioner, Second Lieutenant Ryan W. Davis, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on September 20, 2004.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Davis*, USCA Dkt. No. 02-0065/AF, is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM 33877, August 28, 2001) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 20, 2004.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."

The Due Process Clause of the Fifth Amendment to the United States Constitution states that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

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[1] Appendix A, p. 1a.

Article 125, Uniform Code of Military Justice (UCMJ), Section 925 of Title 10, United States Code [hereinafter Article 125], provides:

> Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

Section 2256(8) of Title 18, United States Code, contained the following definition that applied to a violation of Section 2252A of the same title:

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where–
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Article 134, UCMJ, Section 934 of Title 10, United States Code [hereinafter Article 134], provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

STATEMENT OF THE CASE

On September 22, 1999, petitioner was tried by a general court-martial composed of a military judge sitting alone at Tyndall Air Force Base, Florida. The petitioner pled guilty to one specification alleging that he engaged in consensual sodomy in violation of Article 125, UCMJ, one specification alleging that he wrongfully possessed child pornography, and one specification alleging that he wrongfully distributed child pornography.[2] Both child pornography specifications were charged as violations of Title 18, United States Code, Section 2252A, assimilated under clause 3 of Article 134, UCMJ.

Following the entry of petitioner's guilty pleas, the military judge conducted an inquiry with petitioner to determine whether his pleas were provident. With respect to the specification alleging consensual sodomy between petitioner and B.E.P., the military judge instructed petitioner as follows:

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[2] Petitioner was also charged with and pled guilty to conduct unbecoming an officer in violation of Article 133, UCMJ, for persuading or enticing B.E.P., a person under the age of 18 years, through a means of interstate commerce, to engage in sodomy. Additionally, petitioner pled guilty to obstruction of justice in violation of Article 134, UCMJ.

> Sodomy is unnatural carnal copulation. Unnatural carnal copulation occurs when a person takes into his mouth the reproductive sexual organ of another person, or places his penis into the mouth of another. Penetration of the mouth, however slight, is required to establish this offense, and ejaculation is not required. Neither force nor lack of consent are required for this offense. Stated conversely, neither lack of force nor consent are defenses. (R. 30).

Petitioner then admitted that he met B.E.P., a 16-year-old male, sometime after April 1997 and engaged in consensual mutual oral sodomy with B.E.P. in a park in Gulf Breeze, Florida.[3] (R. 30-31; Pros. Ex. 1).

As to specifications 1 and 2 of Charge III, during the providence inquiry with petitioner the military judge advised petitioner of the relevant definitions relating to the offenses of possession and distribution of child pornography. In doing so, the military judge recited the same definitions of "child pornography" contained in Title 18, Sections 2256(8)(B) and 2256(8)(D) that this Court struck down as unconstitutionally overbroad in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). (R. 39-40).

Specifically, the military judge advised the petitioner during the providence inquiry that the term "child pornography" means, among other things, any visual depiction of sexually explicit conduct where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct. *Id.*

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[3] Under the Uniform Code of Military Justice, the age of lawful consent for sexual activity is 16 years of age.

While setting forth for petitioner the elements of the two child pornography specifications, the military judge added the following element to the offenses:

> That, under the circumstances, [the petitioner's] conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

When adding this third element to the child pornography specifications the military judge acknowledged that the third element was not actually an element of the offenses charged. (R. 37, 38). However, the military judge reasoned that, by adding the third element, the government could "rely upon the lesser included offense of an act or disorder prejudicial to good order and discipline as a lesser included offense" should petitioner's conviction later be overturned on appeal.

In pleading guilty, petitioner agreed that the elements and definitions taken together correctly described his actions. (R. 40). Specifically, in discussing his plea to specification 1 of Charge III, petitioner agreed that he had "possessed three or more images of child pornography." The military judge also asked if petitioner knew "that the individuals depicted in at least three or more of those images were under the age of 18" and whether the individuals depicted were "engaged in sexually explicit conduct or child pornography images, as I have defined that term for you." To each question, petitioner responded "Yes, Your Honor." (R. 47).

With respect to specification 2 of Charge III, petitioner agreed that he distributed one image of "child pornography" by sending a picture depicting two minors engaged in "mutual oral sodomy" to B.E.P. via electronic mail. Additionally, petitioner agreed with the military judge's assertion that, by attaching a file that petitioner knew was "an image or a depiction of individuals under the age of 18

engaging in mutual oral sodomy," petitioner distributed "child pornography. (R. 46). However, throughout the course of the providence inquiry, petitioner never admitted that he knew or believed the images he possessed and the image he distributed were produced through the use of actual minors engaging in sexually explicit conduct.

In addressing the third element that was added by the military judge, the military judge asked petitioner if he agreed that "if individuals in the civilian community knew that we had military members who were storing child pornography on their computers, that they might think a little less of the military generally." Petitioner responded, "Yes, Your Honor." Petitioner also agreed with the military judge's assertion that "having images of child pornography is also the kind of behavior that could get some people upset and cause them to, perhaps, be turbulent or to be upset about it." (R. 48). Finally, when the military judge asked if petitioner agreed "that that conduct is conduct which would be prejudicial to good order and discipline, or which would be service discrediting," petitioner replied, "Yes, Your Honor." (R. 49).

After accepting the petitioner's guilty pleas, the military judge sentenced the petitioner to be dismissed from the Air Force, to be confined for 24 months and to forfeit all pay and allowances. (R. 113).

On appeal of his conviction to the Air Force Court of Criminal Appeals, petitioner specifically challenged the constitutionality of Article 125, UCMJ, and of 18 U.S.C. § 2252A. On 28 August 2001, the Air Force Court affirmed the findings and sentence. *United States v. Davis*, ACM 33877 (A.F. Ct. Crim. App. 28 August 2001) (App. B, p. 16a). On September 20, 2004, the United States Court of Appeals for the Armed Forces granted review of the following two issues:

WHETHER PROSECUTION UNDER ARTICLE 125 VIOLATES SUBSTANTIVE DUE PROCESS BY UNFAIRLY INFRINGING ON SERVICEMEMBERS' FUNDAMENTAL RIGHT TO PRIVACY. ALSO WHETHER PROSECUTION UNDER ARTICLE 125 FOR PRIVATE CONSENSUAL NON-COMMERCIAL SODOMY VIOLATES A STATUTORILY ESTABLISHED ZONE OF PRIVACY WITHOUT A COMPELLING GOVERNMENT INTEREST.

WHETHER APPELLANT'S PLEA OF GUILTY TO POSSESSING AND TRANSPORTING CHILD PORNOGRAPHY UNDER 18 U.S.C. § 2252A IS IMPROVIDENT BECAUSE CONVICTION UNDER SAID STATUTE VIOLATES THE FIRST AMENDMENT'S GUARANTEE OF FREE SPEECH AND BECAUSE THE PHRASES "APPEARS TO BE" AND "CONVEYS THE IMPRESSION" IN THE STATUTE MAKE IT UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

In its order granting review of the issues, the Court of Appeals for the Armed Forces, citing its previous decisions in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), United *States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004), and *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003), amended specifications 1 and 2 of Charge III by striking from each specification all language that made reference to or implied a violation of 18 U.S.C. § 2252A (App. A., pg 2a).[4] The court summarily affirmed the petitioner's

[4] This amendment of the specifications had the effect of affirming convictions under specifications 1 and 2 of Charge III only as to the lesser-included offenses of violations of clause 1 or 2 of Article 134,

conviction under Charge III and its specifications, as amended, and affirmed the remaining charges, specifications, and the sentence.

REASONS FOR GRANTING THE WRIT

This case presents three questions of fundamental importance to the administration of justice in the United States armed forces. First, in light of this Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), can the United States continue to prosecute and punish military members for engaging in private, consensual sexual conduct with other adults even though this Court recognized such conduct as being the sort of liberty interest protected by the Due Process Clause? This is an important federal question that should be settled by this Court.

The second question concerns whether petitioner's admission at trial that his possession and distribution of images depicting minors engaged in sexually explicit conduct was service discrediting is improvident where that admission was based upon a fundamental misunderstanding about what constitutes child pornography held as a result of the use of definitions of child pornography during his trial that this Court struck down as unconstitutionally overbroad in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Finally, the third question concerns the extent to which servicemen and women enjoy First Amendment protections enjoyed by other citizens. Because these questions are of fundamental importance to the millions who serve in the armed forces, these issues should be reviewed by this Court.

UCMJ, rather than a conviction for violating 18 U.S.C. 2252A, assimilated under clause 3 of Article 134, UCMJ, as charged.

I. Petitioner's conviction for violating Article 125, UCMJ, for engaging in consensual sodomy must be set aside in light of this Court's holding in Lawrence v. Texas, 539 U.S. 558 (2003).

The specification of Charge I in petitioner's case alleged the following violation of Article 125, UCMJ:

> In that SECOND LIEUTENANT RYAN W. DAVIS, United States Air Force, Detachment 1, 325th Fighter Wing, Pensacola Naval Air Station, Pensacola, Florida, at or near Gulf Breeze, Florida, did between on or about 16 October 1996 and 31 August 1997, commit sodomy with [B.E.P.], by placing his penis in [B.E.P.'s] mouth and placing [B.E.P.'s] penis into his mouth.

A conviction under Article 125 requires proof of only one element: that the accused engaged in unnatural carnal copulation. *See Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 51(b)(1). The Manual for Courts-Martial offers the following definition of unnatural carnal copulation:

> It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person ... or to place that person's sexual organ in the mouth or anus of another person ...

MCM, Part IV, ¶ 51(c) (2002 ed.).

Under Article 125, a military member who is convicted of private, consensual oral sodomy with another person of consenting age faces a potential maximum punishment that includes up to five years imprisonment and a dishonorable discharge. *MCM*, Part IV, ¶ 51(e)(4).

By its express terms, Article 125 prohibits all oral and anal sex, heterosexual or homosexual, even between husband and wife, whether accomplished by force or with consent. *See United States v. Scoby*, 5 M.J. 160 (C.M.A. 1977). Additionally, Article 125 "does not distinguish between an act committed in the privacy of one's home, with no person present other than the sexual partner, and the same act committed in a public place in front of a group of strangers, who fully apprehend the nature of the act." *Id.* at 163.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court struck down a Texas statue that made criminal the act of sodomy between members of the same sex. This Court, overruling its previous decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), held that the petitioners' right to liberty under the Due Process Clause gives them the full right to engage in private sexual conduct, to include sodomy, without intervention of the government. *Lawrence*, 539 U.S. at 578. This Court recognized "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Ultimately, this Court concluded that the State cannot demean the existence of individuals or "control their destiny by making their private sexual conduct a crime." *Id.*

While the Texas statute made sodomy criminal only among members of the same sex, Article 125 strikes even more broadly at the liberty interests of military members by proscribing private and consensual sexual acts among all adults, even among married couples. By its terms, Article 125 is not directed at any particular impact on the military, as it is not limited in application to sexual acts that somehow affect the operation of the armed forces. Because Article 125, on its face, makes criminal the type of consensual sexual conduct that this Court has now held is part of the liberty interest of citizens protected under the Due Process Clause, the statute is constitutionally invalid.

The Court of Appeals for the Armed Forces recently addressed the application of *Lawrence* in the military context in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). In beginning its analysis, the Court first acknowledged that the "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." *Id.* at 205 (citing *United States v. Mitchell*, 39 M.J. 131, 135 (C.M.A. 1994) (quoting *Weiss v. United States*, 510 U.S. 163 (1994)). However, the Court also noted that constitutional rights may sometimes apply differently to members of the armed forces than they do to civilians. *Marcum*, 60 M.J. at 205 (citing *Parker v. Levy*, 417 U.S. 733, 758 (1974)). Ultimately though, the Court of Appeals recognized that this Court, in *Lawrence*, did not define the liberty interest at stake "in a manner that on its face would preclude its application to military members." *Id.* at 206.

In *Marcum*, the Court of Appeals noted that this Court did not specifically identify the liberty interest at stake in *Lawrence* as a fundamental right. *Id.* at 205. The Court of Appeals decided it would "not presume the existence of such a fundamental right in the military environment when the Supreme Court declined in the civilian context to expressly identify such a fundamental right." *Id.* The lower court was also uncertain as to whether this Court would apply a rational basis test or strict scrutiny in analyzing the constitutional concerns arising from Article 125. *Id.*

In resolving the question of how *Lawrence* impacts Article 125, the Court of Appeals determined that a "contextual, as applied analysis," rather than a facial challenge to Article 125, was required. *Id.* at 206. The court thereafter settled on an analysis that consists of the following three questions:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in Lawrence? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest?

Marcum, 60 M.J. at 206-07 (internal citations omitted).

The Court of Appeals further elaborated on the second question of the analysis, addressing factors identified by this Court as not involved in *Lawrence*. Specifically, the Court of Appeals indicated that the second question was concerned with conduct that involved minors, public conduct or prostitution, or persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. *Id.* at 207.

In *Marcum,* the accused was convicted, contrary to his pleas, of engaging in consensual oral sodomy with another military member. The Court of Appeals, in conducting its contextual analysis, focused on the fact that Marcum's sexual partner was another airman who was subordinate to Marcum within the military chain of command. Noting the prohibition of sexual conduct between superiors and subordinates spelled out in Air Force regulations, the court reasoned that the subordinate airman was "a person 'who might be coerced' or who was 'situated in [a] relationship[] where consent might not easily be refused.'" *Id.* at 208 (citing *Lawrence*, 539 U.S. at 578). Based on the superior/subordinate relationship, the court concluded that Marcum's conduct fell outside the liberty interest identified in *Lawrence* and that Article 125 was, therefore, constitutional as applied to Marcum.

In reaching its conclusion the Court noted that "[w]hile servicemembers clearly retain a liberty interest to engage in certain intimate sexual conduct, 'this right must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and civilian supremacy. *Id.* (citing *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996)). So, even though the only element required to be proven at trial to convict Marcum of violating Article 125 was the act of sodomy itself, the Court of Appeals affirmed his conviction because it found support in the record that there was an uncharged official relationship between the two men which removed their private, consensual sodomy from the liberty interest identified in *Lawrence.*

Unfortunately, the analysis of the Court of Appeals for the Armed Forces is fundamentally flawed for several reasons. First, by sifting through the record of trial for uncharged factors to support the conviction under Article 125, the court took upon itself the role of the fact finder at trial. The court in *Marcum* basically identified, for the first time on appeal, the superior/subordinate relationship as the essential factor that justified Marcum's conviction. While the superior/subordinate relationship may have been established at trial, under Article 125 it would not have been necessary for the court-martial to find that such a relationship existed in order to convict Marcum.

Under the *Marcum* analysis, the finder of fact at trial is relegated to the task of simply finding the predicate fact that an accused engaged in sodomy. Based on that finding alone, the accused will be convicted of a violation of Article 125. The essential holding of the *Marcum* Court is that the offending circumstances that supposedly remove the act of sodomy from the protected liberty interest identified in *Lawrence* need not actually be alleged in the charged offense or found beyond a reasonable doubt by the finder of fact at trial. Instead, any such uncharged aggravating factor can

later become the means by which an appellate court can hold that Article 125 is not unconstitutional as applied to that accused.

The result in *Marcum* amounts to little more than judicial fact-finding on appeal. Such a post-hoc search for uncharged factors that will support a conviction violates an accused's right to a trial of the facts by a court-martial. *See United States v. Riley*, 50 M.J. 410 (C.A.A.F. 1999) (an appellate court cannot affirm a conviction on a theory that was not presented to the fact-finder). As this Court has stated, the right of an accused to have the truth of an allegation determined by the finder of fact at trial is no mere procedural formality, "but a fundamental reservation of power in our constitutional structure. *Blakely v. Washington*, 124 S. Ct. 2531, 2538 (2004).

In settling on a case-by-case, as-applied, analysis the Court of Appeals has apparently concluded that should an accused be convicted under Article 125, on appeal, if there are no other aggravating factors that remove the sexual conduct from the liberty interest recognized in *Lawrence*, the conviction could be overturned. Under such circumstances, the fact that an accused will have already run the gauntlet of the criminal justice system, been convicted of a crime, and served a portion or all of the adjudged sentence will apparently have to be chalked up as a form of judicially-countenanced tough luck.

Another substantial flaw in the *Marcum* decision is that military members stationed throughout the world will have little guidance as to what personal, private sexual conduct with other consenting adults will actually still constitute a criminal offense. This is particularly problematic given the likelihood that a significant percentage of military members engage in conduct criminalized by Article 125. *See* RAND, *Sexual Orientation and U.S. Military Personnel Policy:*

Options and Assessment 58 (1993) (citing surveys and population estimates for the proposition that a majority of both married and unmarried military personnel engage in oral sexual activity, at least occasionally).

While other citizens of the United States can rest assured, in light of *Lawrence*, that their private, consensual sexual conduct with other adults cannot be criminally punished by any governmental entity, military members have no similar assurance. Because Article 125 requires nothing more on its face for conviction than the act of sodomy itself, the holding in *Marcum* does little to illuminate the terrain of the liberty interests afforded military members under the Due Process Clause. If the *Marcum* decision stands, for all practical purposes, the liberty interest recognized in *Lawrence* will be nothing more than a mirage for the military members who volunteer to protect the constitutional rights of every citizen of this country.

The flawed reasoning in *Marcum* is further demonstrated by a review of petitioner's case. This Court has stated:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196 (1948). The Court of Appeals for the Armed Forces has also recognized that "to uphold a conviction on a charge that was neither alleged in the indictment nor presented to a jury at trial offends the most basic notions of due process." *United States v. Brown*, 18 M.J. 360 (C.M.A. 1984).

In this case, petitioner was charged with consensual sodomy with B.E.P. The specification did not allege that he engaged in sodomy with a minor,[5] forcible sodomy, sodomy with a subordinate, public sodomy, sodomy in exchange for money, or any other variation of sodomy. Unfortunately, the decision of the Court of Appeals in this case sheds no light on the ultimate basis for the Court's decision to affirm petitioner's conviction. Because the Court did not explain its decision beyond a mere citation to *Marcum*, petitioner has no way of knowing what conduct of his has resulted in an affirmed conviction under Article 125.

One could speculate that the Court of Appeals based its decision on the notion that petitioner's conduct was public in nature. But, obviously the specification of Charge I did not allege any public conduct. In fact, the specification did not allege any other factor that the Court of Appeals has now said it will look for in deciding whether to affirm a conviction on appeal under Article 125. Because no such additional factor was alleged, petitioner was not on notice prior to or at trial that there were potentially additional unstated elements that he needed to defend against at trial.

Because no additional element was alleged, the military judge was not required to list or describe any additional element. Had petitioner been aware that there was an additional, unstated, element to the offense he was charged with, petitioner may have chosen to litigate the allegation. Based on the specification and petitioner's admission that he engaged in sodomy with B.E.P., nothing more than the act of sodomy was required for the military judge to accept his plea and enter a guilty finding. Although petitioner mentioned during his plea inquiry that the sodomy occurred in a park in

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[5] As stated previously, B.E.P. was 16 years old at the time of the alleged offense (*see* Pros. Ex. 1). Therefore, under the Uniform Code of Military Justice, he was not considered a minor for the purposes of legally consenting to sexual conduct.

Florida, he was not pleading guilty to that fact because it was not an element of the offense. That fact was nothing more than a collateral matter to the charge as alleged and petitioner had no reason to know at the time that such a collateral matter could later form the primary justification for the Court of Appeals to affirm his conviction.

Under this Court's decision in *Lawrence*, the specification of Charge I in this case failed to state a legitimate criminal offense. Appellant was not placed on notice by the specification that there was some aggravating factor present that would remove his conduct from the liberty interest he enjoys as a citizen of the United States. For the appellate court to now find that petitioner is guilty of a violation of Article 125 based on some unstated factor that was not alleged in the specification and to which petitioner did not specifically plead guilty is a substantial violation of his due process right to be informed of the nature of the charge against him.

Because the decision of the Court of Appeals for the Armed Forces in this case conflicts with this Court's holding in *Lawrence* and because this case addresses the important federal question of what liberty interests are protected for military members, this Court should grant review of this issue.

II. Petitioner's admission that his possession and distribution of "child pornography" was service discrediting was not knowing and voluntary in light of the fact that he was provided an unconstitutionally overbroad definition of "child pornography."

This Court has long held that a guilty plea is not voluntary if an accused "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426

U.S. 637, 645 n.13 (1976). "[A] plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousely v. United States*, 523 U.S. 614, 618 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Such notice is all the more critical when a decision of this Court places conduct "beyond the power of the criminal law-making authority to proscribe" and there is "a significant risk that a defendant stands convicted of an 'act that the law does not make criminal." *Id.* at 620 (citations omitted).

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), this Court placed certain speech—that is, speech of a pornographic nature that is neither obscene nor the product of child sexual abuse—beyond the power of Congress to proscribe. This Court held that portions of the Child Pornography Prevention Act (CPPA) of 1996[6] were overbroad and therefore unconstitutional. Specifically, this Court struck down the language "appears to be a minor" in Section 2256(8)(B) and the language "conveys the impression" in Section 2256(8)(D).

In holding that the challenged definitions were unconstitutionally overbroad, this Court recognized that by using the language in question, Congress attempted to extend the ban on child pornography to virtual child pornography. Therefore, the CPPA had the effect of criminalizing substantial amounts of protected expression such as materials that are not legally obscene, as measured by the standard set forth by this Court in *Miller v. California*, 413 U.S. 15 (1973), and that do not involve the actual abuse of children in its creation. *Free Speech Coalition*, 535 U.S. at 241.

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[6] The Child Pornography Prevention Act of 1996 amended Title 18 of the United States Code by revising Sections 2251, 2252, and 2256, and by adding Section 2252A.

In *Free Speech Coalition*, this Court cited examples of the type of virtual child pornography that the unconstitutional language of the CPPA impermissibly criminalized. This Court noted that the unconstitutional definitions under the CPPA would make illegal works such as computer generated images and images created through more traditional means such as Renaissance paintings and pictures that only appear to be of a minors engaging in sexually explicit conduct. *Id.*

This Court realized that the overbroad language of the CPPA would conceivably make criminal the possession of mainstream Hollywood movies such as Traffic and American Beauty, which contain relatively explicit scenes of sexual conduct involving underage characters, even though the actors playing the characters are actually adults who only appear to be minors. *Id.* at 241, 247-48. Ultimately, this Court made clear its concern with the proscription of speech that recorded no crimes and created no victims by its production. *Id.* at 250. Virtual child pornography is such a form of speech.

In *United States v. O'Connor*, the Court of Appeals for the Armed Forces held that O'Connor's guilty plea to receiving and possessing child pornography in violation of Section 2252A, as assimilated under clause 3 of Article 134, was improvident because the military judge had used the same overbroad definitions of child pornography that this Court struck down in *Free Speech Coalition*. The court recognized that, in light of this Court's decision in *Free Speech Coalition*, it is no longer enough to knowingly possess visual depictions that appear to be minors engaging in sexually explicit conduct. Instead, the court acknowledged that, "the 'actual' character of the visual depictions is now a factual predicate to any plea of guilty under the CPPA." *O'Connor*, 58 M.J. at 453.

The court held that it was unclear from the plea inquiry and the record whether O'Connor was pleading guilty to possession of virtual or actual child pornography. In the absence of any discussion or focus in the record regarding the "actual" character of the images, the Court of Appeals stated that it could not conclude that O'Connor's guilty pleas to violations of Section 2252A, as assimilated under clause 3 of Article 134, were provident. *Id.* at 453-54.

The Court of Appeals then considered whether O'Connor's guilty plea could be affirmed as a lesser-included offense under clause 1 or clause 2 of Article 134, UCMJ. The court explained that conduct "is punishable under Article 134 if it prejudices 'good order and discipline in the armed forces' [clause 1], if it is 'of a nature to bring discredit upon the armed forces' [clause 2], or if it is a crime or offense not capital [clause 3]." *Id.* at 452. In discussing the interplay between the three clauses under Article 134, the court stated, "The three clauses do not create separate offenses, but rather provide alternative ways of proving the criminal nature of the charged misconduct." *Id.* (citing *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000).

The court ultimately concluded that O'Connor's guilty plea could not be used to affirm a conviction as to a lesser-included offense under clause 1 or 2 of Article 134. Although O'Connor had actually stipulated at trial that his conduct was service discrediting, the court held that the absence of any discussion of that element during the plea inquiry by either O'Connor or the military judge gave it pause. *Id.* at 454. The court noted that, in the wake of *Free Speech Coalition*, "the 'virtual' or 'actual' status of the images at issue has constitutional significance. That constitutional significance may, in turn, bear on 'the nature of the prohibited conduct', i.e., its service-discrediting character. *Id.* at 454-55.

The Court of Appeals reasoned that O'Connor, in pleading guilty, was focused on the question of whether or not his conduct violated Section 2252A, not whether his conduct was service discrediting. Because there was no conscious discussion of the service discrediting character of his conduct on the record, the court concluded that O'Connor might not have understood the nature of the prohibited conduct. Accordingly, the court refused to affirm a conviction under either clause 1 or clause 2 of Article 134. However, the Court of Appeals in *O'Connor* did leave open the question of whether, in the wake of *Free Speech Coalition*, the possession of virtual child pornography can be punishable as service discrediting conduct under clause 2 of Article 134.

The Court of Appeals for the Armed Forces subsequently answered that question in the affirmative in *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004). In *Mason*, the accused, a commissioned officer, pled guilty to knowingly receiving child pornography via the Internet on a government computer while he was on duty. During the plea inquiry, in defining the offense for Mason, the military judge included what he termed a "fourth element." This element addressed whether Mason's conduct was either prejudicial to good order and discipline or service discrediting. The military judge explained that he was adding this "fourth element" in the event it is determined that Mason's plea was improvident on the charged offense. Mason stated that he understood the "fourth element" and why it had been included. He then admitted that his conduct was prejudicial to good order and discipline or service discrediting. *Id.* at 18.

Just as in *O'Connor*, the Court of Appeals held that Mason's guilty pleas to offenses under Section 2252A were improvident because the military judge provided the accused with the definitions of child pornography that this Court stuck down as unconstitutional in *Free Speech Coalition*.

The court held that, under its holding in *O'Connor*, "a provident guilty plea to a violation of the CPPA must reflect that the accused violated those portions of the statute not affected by the Supreme Court's ruling in *Free Speech Coalition*." *Id.*

But unlike the situation in *O'Connor*, the court went on to hold that Mason's admissions during the providence inquiry could be used to affirm a conviction for a lesser-included offense under clause 1 and clause 2 of Article 134. In doing so, the Court focused on the fact that the military judge advised Mason of the "fourth" element and that Mason admitted that his conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. *Id.*

In distinguishing its decision in *Mason* from the holding in *O'Connor*, the CAAF explained:

> The plea colloquy in *O'Connor* "was focused solely on 'the nature of the prohibited conduct' under the CPPA without any discussion or acknowledgment of the criminal nature of the conduct deriving alternatively and independently from its character as service-discrediting or prejudicial to good order and discipline.

Mason, 60 M.J. at 19. So, to the Court of Appeals, the important distinction between *O'Connor* and *Mason* was the admission by Mason that his conduct was service discrediting or prejudicial to good order and discipline. However, that was not the end of the Court's analysis.

In determining whether it could affirm a finding of guilt under clause 1 or clause 2 of Article 134, the court stated that the question involves a constitutional dimension flowing from this Court's "extension of First Amendment protection

to certain depictions of minors engaging in sexually explicit conduct, i.e., 'virtual' as opposed to 'actual' images." *Id.* In analyzing that constitutional dimension, the Court held that "the ultimate question is whether the status of the images in the present case as 'virtual' or 'actual' is of consequence in the context of assessing the providence of Mason's guilty plea under clauses 1 and 2." *Id.*

The Court of Appeals focused its analysis on the fact that Mason admitted that he was a commissioned officer in the United States Air Force and that he had received and viewed the pornographic images on a government computer at his workplace. The court held that, under those circumstances, the status of the images as "virtual" or "actual" child pornography was of no consequence because the distinction between "actual" and "virtual" child pornography did not alter the character of Mason's conduct in viewing the material on government equipment at work. *Id.* at 20. In fact, the court reasoned that even if the images in question were only "virtual" in nature and did not depict actual minors engaging in sexually explicit conduct, the fact that Mason viewed the images on a government computer in his workplace supported a conviction under clause 1 or clause 2 of Article 134.[7]

In the petitioner's case, in defining the offense charged, the military judge set forth the very same unconstitutional definitions struck down by this Court in *Free Speech Coalition.* The Court of Appeals apparently concluded, as it had in *O'Connor* and *Mason*, that petitioner had an incomplete understanding of the charged offense as a result of the reliance by the military judge on the unconstitutional definitions. Therefore, as the court had done in *Mason*, it

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[7] In affirming Mason's conviction based solely on clauses 1 and 2 of Article 134, just as in the present case, the court amended the specification by striking all language in the specification that made reference to or implied a violation of 18 U.S.C. § 2252A.

acquitted petitioner of the offense charged by deleting from the specification any reference to Section 2252A. Appendix A, p. 2a. But the Court of Appeals, without explanation, affirmed petitioner's conviction under clause 1 and clause 2 of Article 134. Although the court did not explain its decision, it appears that the court concluded that it could do so because petitioner agreed with the military judge's assertion that his conduct was service discrediting.

By applying the holding in *Mason* to the facts in the present case, the Court of Appeals has apparently ignored its own concerns, expressed in both *O'Connor* and *Mason*, regarding the "constitutional dimension" surrounding the nature of the images in question as either "actual" or "virtual" child pornography. While petitioner agreed during the providence inquiry that the images in question depicted minors engaged in sexually explicit acts, he never admitted that the images were created using actual children who were engaged in sexually explicit conduct. In fact, it is completely unclear from petitioner's statements whether he believed the images depicted "actual" or merely "virtual" child pornography.

Of course, at the time of his pleas, this Court had not yet invalidated two of the definitions contained in 18 U.S.C. § 2256(8). So in discussing his pleas with the military judge, with the unconstitutional definitions in mind, petitioner had no reason to distinguish between "actual" and "virtual" child pornography. The state of the law at the time made any such distinction irrelevant and inconsequential. Certainly the Court of Appeals was correct therefore in refusing to affirm petitioner's convictions under clause 3 of Article 134 as charged. However, in affirming convictions under clause 1 or 2 of Article 134, the Court has apparently drawn what it considers an important distinction where there is, in fact, no substantive difference.

Petitioner agreed that his conduct was service discrediting only after the military judge essentially advised him that it was against federal law to possess virtual child pornography as the definitions under the CPPA provided at the time. It was only in this context that petitioner admitted that his conduct met the criteria of the "third element." Petitioner was simply agreeing with the military judge's assertion that his conduct was service discrediting or prejudicial because his acts were clearly illegal under the law in effect at the time, regardless of whether the images depicted "actual" child pornography.

Petitioner's agreement that his actions were service discrediting simply cannot be logically divorced from the critical misunderstanding of the definition of child pornography held as a result of the unconstitutional definitions provided by the military judge. He was, after all, improvidently pleading guilty to the charged offense that had been assimilated under clause 3 of Article 134.

The faulty reasoning of the CAAF in affirming petitioner's convictions under clause 1 or 2 is apparent when the effect the unconstitutional language of the CPPA had on petitioner is factored into the equation. If, for example, petitioner had pled guilty at his court-martial based solely on his possession of a copy of the movie Traffic, his conviction could have been upheld on appeal under the law as it existed at the time of his court-martial. Based on his understanding of the law at the time, as provided by the military judge, petitioner would also have undoubtedly agreed that his conduct in possessing that movie, and consequently violating the express provisions of the CPPA, was service discrediting.

However, the intervening decision of this Court in *Free Speech Coalition* makes all the difference. Because a conviction based on an admission that he possessed "virtual" child pornography such as the movie Traffic could not now

be upheld, absent an allegation that the materials were obscene, petitioner's convictions should not then be affirmed as a violation of either clause 1 or clause 2 merely because petitioner admitted that his actions were service discrediting.

Petitioner also did not reveal facts, such as those revealed in *Mason* that could objectively support a conviction based on his discussion of the "third element." Unlike the appellant in *Mason*, who had downloaded pornographic images onto his government computer at his work place, the petitioner possessed and viewed pornographic images on his personal computer in the privacy of his own home.

In light of the fact that this Court has held that possession of "virtual" child pornography is constitutionally protected as long as it is not obscene, the petitioner might not now agree that his conduct was either prejudicial to good order and discipline or service discrediting. However, the Court of Appeals for the Armed Forces is apparently willing to hold him to an admission to that effect even though that admission was made at a time when he had no reason to know that the portions of the CPPA that served to criminalize "virtual" child pornography were unconstitutional.

Unlike the court's conclusion in *Mason*, the status of the images in the present case as either "virtual" or "actual" is constitutionally significant in the context of assessing the validity of petitioner's pleas. It cannot be said, therefore, that the petitioner's guilty plea to the "third element" was "voluntary" and "intelligent" as the Constitution requires it to be. Because the decision of the Court of Appeals for the Armed Forces conflicts with relevant decisions of this Court on the constitutional requirement that a plea be "voluntary," this Court should exercise its supervisory power and grant the petition on this issue.

III. Petitioner lacked "fair warning" that his conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

The final question asks this Court to examine whether Article 134, as it was applied in this case, is overly broad under the First Amendment and is void for vagueness under the Fifth Amendment. The petitioner does not challenge the constitutionality of Article 134 as a whole.

Clauses 1 and 2 of Article 134 provide that a court-martial may punish any *act* or *omission* as long as the act or omission was either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. In this case, because petitioner did not admit that the images in question were produced through the use of children engaging in sexually explicit conduct, the petitioner stands convicted of knowingly possessing and distributing virtual child pornography on his personal computer at his home. But the charged offenses did not allege and the petitioner did not admit that the images were obscene. Thus, the petitioner's conviction should be affirmed only if the mere possession of virtual child pornography, without more, is *per se* prejudicial to good order and discipline or service discrediting.

The Court of Appeals for the Armed Forces apparently reached this conclusion. To do so, however, the court must have also necessarily concluded that, by definition, the virtual images had no value of any kind—political, scientific, literary, or artistic. But such a conclusion ignores the concerns this Court stated in *Free Speech Coalition* about the government's proscription of speech that is neither obscene nor the product of sexual abuse.

If the court's decision in this case is allowed to stand, the government will have arbitrarily diminished the First Amendment rights of its servicemen and women. Even

worse, servicemen and women will necessarily be reduced "to reading only what is fit for children" or risk being criminally prosecuted for matters about which they have no "fair warning." The peril arises when the proscribed speech is constitutionally protected in the larger civilian society and there is no government regulation expressly prohibiting it in the military. A military member of ordinary intelligence must therefore speculate as to what materials he can lawfully possess and what materials are prohibited.

To be sure, the First Amendment rights of servicemen and women are not necessarily coextensive with those of ordinary citizens. As this Court has stated in *Parker v. Levy*, 417 U.S. 733 (1974):

> While the members of the military are not excluded from the protections granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Id. at 758 (affirming a conviction under Article 134 where an officer had *publicly* urged enlisted personnel to refuse to obey orders which might send them into combat).

But this is not a case where the petitioner openly urged subordinates to disobey orders. This is a case about what he viewed in the privacy of his own home or shared with another like-minded individual. This Court has never fully clarified the extent to which military members do or do not enjoy First Amendment rights in their private lives. The absence of guidance of this kind leaves a void that raises

serious questions about the "fair warning" and "notice" that military members have about conduct for which they can be punished but which ordinary citizens are free to engage in.

A new recruit and a seasoned veteran alike may fairly ask if he or she can legally acquire, for example, copies of movies such as "American Beauty" or "Traffic" or some modern production of "Romeo and Juliet" without being subjected to a court-martial. Men and women "of common intelligence must necessarily speculate as to what . . . conduct is to the 'prejudice of good order and discipline in the armed forces' or conduct 'of a nature to bring discredit upon the armed forces' really means." *Parker v. Levy*, 417 U.S. at 762 (Blackmun, J, dissenting).

In the wake of *Free Speech Coalition* and in the absence of any government regulation prohibiting the receipt of virtual child pornography, this case presents an important constitutional question that has not been, but should be, settled by this Court. This Court should therefore grant review of the third question presented.

CONCLUSION

For the foregoing reasons, the petitioner therefore respectfully requests that this Court grant his petition for a Writ of Certiorari.

Respectfully submitted,

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December 2004

Appendix A

UNITED STATES, Appellee

v.

Ryan W. DAVIS, Appellant

No. 02-0065/AF

Crim. App. No. 33877

United States Court of Appeals for the Armed Forces

Decided September 20, 2004

On consideration of Appellant's Petition for Grant of Review and in light of this Court's decisions in United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004), United States v. Mason, 60 M.J. 15 (C.A.A.F. 2004), and United States v. O'Connor, 58 M.J. 450 (C.A.A.F. 2003), it is, by the Court, this 20th day of September, 2004,

ORDERED:

That the Petition for Grant of Review is granted on the following issues:

> WHETHER PROSECUTION UNDER ARTICLE 125 VIOLATES SUBSTANTIVE DUE PROCESS BY UNFAIRLY INFRINGING ON SERVICEMEMBERS' FUNDAMENTAL RIGHT TO PRIVACY. ALSO WHETHER PROSECUTION UNDER ARTICLE 125 FOR PRIVATE CONSENSUAL NON-COMMERCIAL SODOMY VIOLATES A STATUTORILY ESTABLISHED ZONE OF PRIVACY WITHOUT A COMPELLING GOVERNMENT INTEREST.

WHETHER APPELLANT'S PLEA OF GUILTY TO POSSESSING AND TRANSPORTING CHILD PORNOGRAPHY UNDER 18 U.S.C. § 2252A IS IMPROVIDENT BECAUSE CONVICTION UNDER SAID STATUTE VIOLATES THE FIRST AMENDMENT'S GUARANTEE OF FREE SPEECH AND BECAUSE THE PHRASES "APPEARS TO BE" AND "CONVEYS THE IMPRESSION" IN THE STATUTE MAKE IT UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

In terms of Appellant's challenge to his conviction for possessing and distributing child pornography, it is ordered that specifications 1 and 2 of Charge III are amended to read as follows:

In that Second Lieutenant RYAN W. DAVIS, United States Air Force, Detachment 1, 325th Fighter Wing, Pensacola Naval Air Station, Pensacola, Florida, did at or near Pensacola, Florida, on or about 15 December 1997, knowingly possess images of child pornography ~~that had been transported in interstate commerce; in violation of Title 18, United States Code, Section 2252A(a)(5)(B)~~.

In that Second Lieutenant RYAN W. DAVIS, United States Air Force, Detachment 1, 325th Fighter Wing, Pensacola Naval Air Station, Pensacola, Florida, did in the continental United States between on or about 16 October 1997 and on or about 16 October 1997, knowingly distribute by computer child pornography ~~that had been transported in interstate commerce; in violation of Title 18, United States Code, Section 2252A(a)(2)(A)~~.

The decision of the United States Air Force Court of Criminal Appeals is affirmed as to Charge III and its

specifications as amended, as well as to the remaining Charges, specifications, and the sentence.

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

—

UNITED STATES

v.

Second Lieutenant RYAN W. DAVIS
United States Air Force

ACM 33877

28 August 2001

Sentence adjudged 22 September 1999 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: Linda S. Murnane (sitting alone).

Approved sentence: Dismissal, confinement for 24 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Captain Karen L. Hecker.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Ronald A. Rodgers, and Captain Peter J. Camp.

Before

YOUNG, BURD, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

PECINOVSKY, Judge:

Pursuant to his pleas, appellant was convicted of: 1) sodomy; 2) conduct unbecoming an officer by knowingly persuading, inducing, enticing, or coercing a 15-year-old boy to engage in indecent acts; 3) possession and distribution of child pornography, in violation of 10 U.S.C. § 2252A(a)(5)(B); and 4) obstructing justice. Articles 125, 133, 134, UCMJ, 10 U.S.C. §§ 925, 933, 934. He was sentenced by a military judge to a dismissal, 24 months' confinement, and forfeiture of all pay and allowances. Appellant now raises the following errors: 1) The plea for possession of child pornography was improvident because appellant deleted the images; 2) Appellant was subjected to cruel and unusual punishment, in violation of Article 55, UCMJ, and the Eighth Amendment, due to sexual orientation harassment and falling debris; 3) Appellant received ineffective assistance of counsel in his clemency submission; 4) Article 125, UCMJ, violates the First Amendment's establishment clause; 5) Article 125 violates the Eighth Amendment; 6) Article 125 violates substantive due process, infringing on the right to privacy; 7) Article 125 violates the Fifth Amendment's equal protection clause; and 8) The guilty plea as to child pornography was improvident because the statute's "virtual depiction" section is unconstitutionally vague and overbroad. All but the first issue were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Having fully considered appellant's arguments, we affirm.

I. Facts

Appellant had a hobby. He liked to surf the web and download child pornography. He also entered internet chat rooms and, during one of these chats, met the victim, BEP, a

15-year-old boy. Appellant sent BEP e-mails with pictures of underage boys engaged in mutual oral sodomy. Appellant met with BEP, but did not initially engage in sex with him. However, shortly after BEP's 16th birthday, they engaged in mutual oral sodomy.

Appellant was convicted, pursuant to his pleas, of possession of child pornography, sodomy, and coercion of BEP to engage in indecent acts. Appellant's offenses were discovered after America On Line (AOL), an internet service provider, reported BEP to the Federal Bureau of Investigations (FBI) for receiving child pornography. Subsequently, BEP gave appellant's name to the FBI. On 15 December 1997, the FBI seized appellant's computer, pursuant to a search warrant, and interviewed appellant. Following the FBI interview, appellant contacted BEP through the internet and tried to get BEP to change his story as to their sexual encounter.

II. Deleted Child Pornography Images

Appellant pled guilty to a specification alleging that he wrongfully possessed child pornography on or about 15 December 1997. He now asserts his plea is improvident. Appellant alleges that during his unsworn statement he set up matter inconsistent with that plea – he said he had deleted the images by August 1997.

In order to overturn a military judge's acceptance of a guilty plea, the record of trial must "show a 'substantial basis' in law and fact for" rejecting the plea of guilty. United States v. Faircloth, 45 M.J. 172, 174 (1996) (quoting United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)). In Faircloth, our superior court adopted the language of Senior Judge Pearson, concurring in part and dissenting in part, in an Air Force appellate decision: "[T]his is a guilty plea, folks. . . . By pleading guilty, appellant knowingly waived a

trial of the facts." Id. at 174 (citing United States v. Faircloth, 43 M.J. 711, 718 (A.F. Ct. Crim. App. 1995)). Where an appellant pleads guilty, the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence. Faircloth, 45 M.J. at 174.

After being advised of the elements of the offense, appellant told the military judge that he possessed the child pornography on 15 December 1997. In the stipulation which accompanied appellant's guilty plea, appellant agreed to the following:

> Between 6 June 1996 and 15 Dec 1997, the accused received each [computer graphic file depicting young men and boys under the age of 18 either naked or engaged in sexual activity, to include oral and anal sodomy and masturbation] via e-mail, or by downloading them to his computer from Internet web sites and Internet news groups. . . . The accused viewed each of these images and then stored them on his computer. Some he deleted after viewing them and others he deleted later. When a file is deleted it remains on the computer. A file deleted becomes a hidden file. Hidden files do not readily appear on the computer or in any directories. The [a]ccused knew that some or all of these deleted files remained on his computer hard drive. The [a]ccused knew that there were means available to recover these files.

Contrary to appellant's contention, his unsworn statement does not say that he deleted the images by August 1997. It merely states that he realized he was "on the wrong path" in August 1997, sought guidance from a pastor, and deleted the images before being confronted by the FBI. There is nothing in his unsworn statement that is inconsistent with his guilty plea. Furthermore, whether appellant actually possessed the "deleted" files on 15 December 1997 is a

matter of proof which an accused may contest at trial. By pleading guilty, he knowingly waived a trial of the facts as to that issue. *Faircloth*, 45 M.J. at 174.

Notwithstanding appellant's waiver of the issue of possession, under the facts of this case, appellant did knowingly possess the child pornography on the date charged, because he knew that the deleted images could be retrieved. The federal circuits are split on whether deleted images are "possessed" under 18 U.S.C. § 2252A(a)(5)(B). *United States v. Lacy*, 119 F.3d 742, 748 (9th Cir. 1997); *United States v. Upham*, 168 F.3d 532, 537 (1st Cir. 1999); *United States v. Hall*, 142 F.3d 988, 997 (7th Cir. 1998). The Ninth Circuit decision in *Lacy* is most closely on point. In *Lacy*, a conviction for child pornography possession was upheld where the accused "attempted to erase" the images, but knew that the images were still on his hard drive and diskettes. *Lacy*, 119 F.3d at 748.

Decisions from the First and Seventh United States Circuit Courts of Appeals, addressing the deletion of child pornography images, are factually distinguishable. In *Upham*, the conviction for possession of child pornography was upheld where the deletion of the images occurred after the charged date of possession. That court refused to consider the issue of whether "it would be unlawful standing alone to possess, with the requisite knowledge, a hard drive or diskette with deleted (but recapturable) images." *Upham*, 168 F.3d at 537. Similarly, in *Hall*, the conviction was affirmed for possession of child pornography. There, the appellant failed to delete the images and the court noted that "Hall had every opportunity to delete any computer files that he did not wish to retain." *Hall*, 142 F.3d at 997. The issue of how the images could have been deleted was never squarely before the court. The operative facts here, as admitted to in the providence inquiry and the stipulation of fact, are that appellant knew the images were still on his

computer after deletion and that they were retrievable. Following the rationale in *Lacy*, appellant knowingly possessed the child pornography on the date charged.

III. Sexual Orientation Harassment and Falling Debris

Appellant alleges that, while in confinement, violations of Article 55, UCMJ, 10 U.S.C. § 855, and the Eighth Amendment of the United States Constitution occurred, due to sexual orientation harassment and falling debris. Appellant seeks "appropriate relief," without specifying what it is he wants us to do. An appellant who seeks judicial review of prison conditions must establish a "clear record" of both "the legal deficiency in administration and the jurisdictional basis for action." *United States v. White*, 54 M.J. 469, 472 (2001) (citing *United States v. Miller*, 46 M.J. 248, 250 (1997)).

Appellant complains that, while in confinement, some inmates and prison staff spoke to him in a rude and sexually harassing way, which caused him embarrassment. The complaint was investigated and substantiated, and corrective action was taken. We have reviewed appellant's allegations. No further relief is warranted. Appellant's sexual orientation harassment complaint does not rise to the level of cruel and unusual punishment. *See United States v. Sanchez*, 53 M.J. 393, 396-97 (2000).

Appellant further complained that a piece of ceiling fell on him while in confinement. However, an investigation indicated he sustained no visible injury. Further, there is no evidence of "deliberate indifference" to inmate health or safety. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991)). Appellant has, therefore, failed to demonstrate that his prison conditions were in violation of Article 55 or the Eighth Amendment.

IV. Ineffective Assistance of Counsel

"Servicemembers are guaranteed the right to effective assistance of counsel." *United States v. Scott*, 51 M.J. 326, 329 (1999) (citing *United States v. MacCulloch*, 40 M.J. 236, 238 (C.M.A. 1994)), *cert. denied*, 529 U.S. 1075 (2000); Article 27, UCMJ, 10 U.S.C. § 827. In determining whether there is a violation of this right, the Supreme Court and our superior appellate court have applied a two-prong test. *Strickland v. Washington*, 466 U.S. 668 (1984); *Scott*, 51 M.J. at 329. An appellant must first show that "counsel's representation fell below an objective standard of reasonableness," *Strickland,* 466 U.S. at 688; and second, that there was prejudice. *Id.* at 692. "[A] criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *United States v. Loving*, 41 M.J. 213, 248-49 (1994) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)), *aff'd*, 517 U.S. 748 (1996).

Appellant alleges that, post-trial, he had difficulties in contacting his defense counsel for purposes of submitting his clemency matters. The day prior to the clemency submission deadline, appellant sent an unsigned clemency statement to his counsel for review. Counsel submitted the unsigned statement the following day to the convening authority without seeking a delay. In his affidavit, appellant alleges that he intended to submit his arguments that Article 125 and the child pornography statute were unconstitutional.

Here, an evidentiary hearing is not required to resolve factual disputes. *United States v. Ginn*, 47 M.J. 236, 248 (1997). The only "harm" experienced by appellant is that the convening authority did not see a signed clemency statement and did not get to review appellant's constitutional attacks on the statutes. Regardless of whether the failure of counsel to obtain a delay in submission of clemency matters constituted

ineffective assistance of counsel, appellant has not demonstrated prejudice. *See Strickland,* 466 U.S. at 692; Article 59(a), UCMJ, 10 U.S.C. § 859(a).

V. Constitutionality of Article 125

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant raises constitutional challenges to Article 125, UCMJ, 10 U.S.C. § 925, under the First Amendment, the equal protection aspect of the Fifth Amendment, and the Eighth Amendment. The constitutionality of a statute is a question of law; therefore, the standard of review is de novo. *United States v. Wright*, 53 M.J. 476, 478 (2000) (citing *United States v. Brown*, 25 F.3d 307, 308 (6th Cir. 1994)).

A) First Amendment Establishment Clause

Appellant argues that Article 125 violates the First Amendment's prohibition against the establishment of religion. He alleges that the religious basis of Article 125's criminalization of sodomy is openly articulated by military courts, citing *United States v. Jones*, 14 M.J. 1008 (A.C.M.R. 1982). However, appellant's reliance upon *Jones* as the basis for his constitutional challenge is misplaced. The Army appellate court, in *Jones*, simply noted that a biblical passage stated that oral sodomy is unnatural or deviant sexual intercourse. *Jones*, 14 M.J. at 1010. That court also noted that legal scholars including Blackstone, Pollock, and Maitland, and the Army and Navy appellate courts have expressed the same proposition. *Id.*

As opposed to finding a religious purpose to Article 125, we agree with the Ninth Circuit's holding, in *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1384 (9th Cir. 1981), that "in a military setting the proscriptions of Article 125 have a legitimate secular purpose and effect." Appellant has

failed to demonstrate that a First Amendment violation of the Establishment Clause exists in Article 125.

B) Eighth Amendment

Appellant argues that Article 125 violates the Eighth Amendment's prohibitions against cruel and unusual punishment by creating an offense based upon his status as a homosexual and inflicting disproportionate punishment.

A servicemember is entitled, both by statute and the Eighth Amendment, to protection against cruel and unusual punishment. *United States v. Avila*, 53 M.J. 99, 101 (2000); *United States v. Matthews*, 16 M.J. 354, 368 (C.M.A. 1983); Article 55, UCMJ, 10 U.S.C. § 855. In *United States v. White*, our superior court spelled out the prohibitions against cruel and unusual punishment:

> In *Estelle v. Gamble*, 429 U.S. 97 (1976), the Supreme Court said that the framers' intent behind the Eighth Amendment was to prevent barbaric and torturous forms of punishment. In more recent history, the standard for what constitutes cruel and unusual punishment has developed into more than physical torture. Instead, the current standard is that the Eighth Amendment prohibits "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,' . . . or which 'involve the unnecessary and wanton infliction of pain . . . .'" *Id.* at 102-03 (citations omitted).

White, 54 M.J. 469, 473-74 (2001).

Appellant relies upon dicta in Justice Powell's concurring opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), for the proposition that an Eighth Amendment issue

exists in the criminalization of sodomy. In his concurrence, Justice Powell agreed with the majority of the Supreme Court that the Georgia sodomy statute did not violate any constitutionally guaranteed right of privacy for homosexuals to engage in sodomy. Emphasizing that the Georgia statute at issue in the case, Ga. Code Ann. § 16-6-2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy, Justice Powell commented that, "In my view, a prison sentence for such conduct -- certainly a sentence of long duration -- would create a serious Eighth Amendment issue." *Bowers*, 478 U.S. at 197 (Powell, J., concurring). Here, the maximum punishment for nonforcible sodomy under Article 125 is confinement for 5 years, a dishonorable discharge, and forfeiture of all pay and allowances. Appellant has failed to demonstrate that an Eighth Amendment violation exists in the maximum punishment enforceable under Article 125.

C) Right to Privacy

Appellant claims that Article 125 violates a fundamental right of privacy to engage in homosexual sodomy. In Bowers, the Supreme Court resolved the issue of a right to privacy for homosexual sodomy, holding that no such right exists. Bowers, *478 U.S. at 189. Subsequent decisions by our superior court have held that no fundamental right to privacy exists, even for consensual heterosexual sodomy.* United States v. Gates, 40 M.J. 354, 354-55 (C.M.A. 1994); United States v. Henderson, 34 M.J. 174, 175-76 (C.M.A. 1992); United States v. Fagg, 34 M.J. 179, 180 (C.M.A. 1992); United States v. Scoby, 5 M.J. 160 (C.M.A. 1978). Here, appellant's claim that Article 125 violates a fundamental right of privacy fails.

D) Equal Protection

The standards created by the principle of equal protection apply not only to laws themselves, but also to the manner in which they are applied. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.").

Appellant does not mount a facial challenge to Article 125, conceding that "Article 125 is a neutral statute on its face in that it does not discriminate against homosexuals in its actual construction." Rather, he initially alleges that the statute is unequal in both its effect and its application. While appearing to mount an "as applied" challenge to the statute, appellant restates his challenge in his reply brief, stating that he "does not claim the article is unequally applicable to heterosexuals and homosexuals, but rather that it unfairly limits prescribed liberties to homosexuals." Appellant alleges that "heterosexual servicemembers are allowed to have a normal sex life, whereas homosexuals are forced into celebicy (sic)."

Although styled as an equal protection claim, appellant's challenge to Article 125 is neither a facial nor "as applied" equal protection challenge. He is simply alleging that the sodomy statute unfairly impinges upon his ability to have homosexual sex. In essence, he is restating his privacy claim, which has been rejected by the Supreme Court. *Bowers*, 478 U.S. at 197.

VI. Constitutionality of 18 U.S.C. § 2252A

Appellant alleges his guilty plea to possession of child pornography was improvident because the "virtual

depiction" section of 18 U.S.C. § 2252A is unconstitutionally vague and overbroad. Although he did not contest the constitutionality of this statute at trial, he did so before this court, contending that the statute is vague and overbroad both facially and as applied in his case. Appellant relies upon *Free Speech Coalition v. Reno,* 198 F.3d 1083 (9th Cir. 1999), which found two phrases in the definition of child pornography, as contained in 18 U.S.C. § 2256, both overbroad and vague, but otherwise upheld the constitutionality of 18 U.S.C. § 2252A.

The Supreme Court has long recognized that governments are "entitled to greater leeway in the regulation of pornographic depictions of children" than in the regulation of other forms of pornography. *New York v. Ferber*, 458 U.S. 747, 756 (1982).

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. . . . The category of 'sexual conduct' proscribed must also be suitably limited and described.

Id. at 764.

Under this constitutional framework, 18 U.S.C. § 2252A has withstood constitutional attacks asserting that it is overbroad and vague. *United States v. Fox,* 248 F.3d 394 (5th Cir. 2001); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000); *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999). Additionally, as noted above, with the exception of two phrases in the definition of child pornography, as contained in 18 U.S.C. § 2256, the Ninth Circuit Court of

Appeals has also upheld the constitutionality of 18 U.S.C. § 2252A.

Finding the reasoning of the First, Fourth, Fifth, and Eleventh United States Circuit Courts of Appeal persuasive, the Court of Appeals for the Armed Forces recently held that 18 U.S.C. § 2252A is constitutional. *United States v. James*, No. 00-0592/N-MC, slip op. at 7 (15 Aug 2001). Additionally, as in *James*, the appellant freely admitted his belief that the photographs he possessed depicted minors; appellant did so both during the providence inquiry and during his second interview with the Air Force Office of Special Investigations. We, therefore, find that the statute was not overbroad as applied to him. *See Id.*, slip op. at 8-11. Finding no substantial basis in law or fact for questioning the appellant's pleas, we find this assignment of error to be without merit. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Accordingly, the findings and sentence are

AFFIRMED.

BURD, Senior Judge: Concurs in result.

OFFICIAL

LANE A. THURGOOD, Captain, USAF
Chief Commissioner